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In the Supreme Court

OF THE

United States of America.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CARLIN, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

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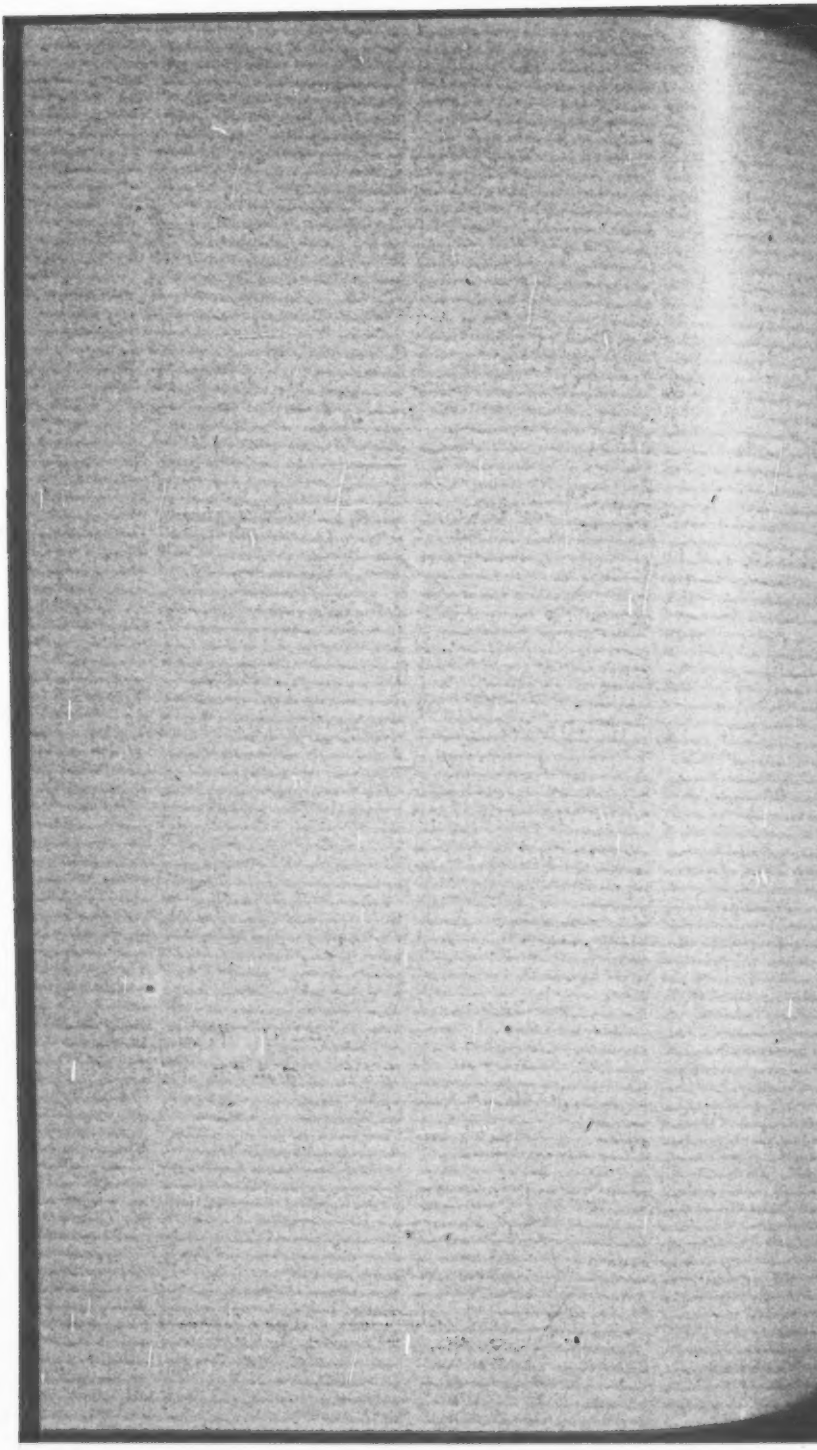

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The opinion of the Honorable Circuit Court of Appeals for the Fifth District states the nature and result of the case and the portant facts so clearly that we do not see that we can aid it, and we only wish to call the Court's attention to the fact that, instead of the maul in controversy being located by the evidence near the foreman, Walsh, *ten or fifteen* minutes before the accident, as stated

in the Court's opinion, it was so located within *one or two minutes* of the accident, as will appear from the statement of the evidence hereinafter made.

We do not preface our brief with a statement of the nature and result of the cause of action, for the reason that we presume the plaintiff in error will make one, and the opinion of the Court below, as aforesaid, makes a full statement, and one of the specifications of error being based upon the refusal of a peremptory charge, our reply makes it necessary that we set forth the evidence substantially in full.

In view of the form of the assignments, we feel that it is necessary for us to call this Court's attention thereto by two independent propositions, which we make without argument, merely citing the authorities thereunder.

FIRST INDEPENDENT PROPOSITION.

The assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 can not be considered by the Court, for that they are not in compliance with the rules of this Court, in that the evidence, if any there be, showing the relevancy of the propositions of law propounded thereby is neither quoted in full nor its substance referred to in the assignments of error.

AUTHORITIES.

Rules of the United States Circuit Court of Appeals, Rules 11 and 24, 1 Fed Rep. XIV, xx.

Union Casualty and Surety Co. vs. Schwerin, 26 C. C. A., page 45; 81 Fed., p. 529.

Newman vs. Virginia, T. & C. Steel & Iron Co., 25 C. C. A., 382; 80 Fed. Rep., 228.

Grape Creek Coal Co. vs. Farmers' Loan & Trust Co., 12 C. C. A., 353; 63 Fed., 891; 80 Fed. Rep., 228.

Southwest Virginia Imp. Co. vs. Frari, 7 C. C A., 149; 58 Fed. Rep., 171.

Van Gunden vs. Virginia Coal and Iron Co. 3 C. C. A., 294; 52 Fed Rep., 838.

SECOND INDEPENDENT PROPOSITION.

The assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9. 10, 11, 12, 13, 14, 15 and 16 cannot be considered by the Court, for that the same are too broad and general under the rules of this Court.

AUTHORITIES.

Grand Trunk Ry. Co. vs. Ives, 144 U. S., 417.

Van Stone vs. Stillwell & Brice Mfg. Co., 142 U. S., 128.

COUNTER-PROPOSITION

UNDER FIFTH, NINTH, FIFTEENTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH SPECIFICATIONS OF ERROR.

The verdict of the jury was amply supported by sufficient testimony.

ARGUMENT AND STATEMENT.

We think it better to combine both argument and statement on a proposition of the character of this one, and therefore pursue that course.

We will lay the evidence before the Court, as we see it, and the Court will judge.

In the first place, M. Carlin was hurt; in the second place, he was hurt by a hammer hurled against him by a train approaching him; in the third place, the hammer was one which had been in use

by the bridge gang, not only before they went to work on the Aledo bridge, but on the morning of the accident; in the fourth place, the hammer was quite a large one, eight or ten inches long, weighing from ten to fourteen pounds, with a long handle in it, three feet long; in the fifth place, this hammer was found near Carlin immediately after his injury, with the handle freshly broken out; in the sixth place, the foreman was on top of the bridge when the accident occurred.

These facts, we take it, are undisputed, and are set out as forming the basis for the establishment of the facts, wherein it is contended that the evidence is insufficient.

It should be remembered that the recovery of plaintiff was confined by the charge of the Court, so that if the jury believed that any other person than the foreman was on the bridge at the time of the happening of the accident he must fail of a recovery.

Therefore, the facts to be established in addition to those heretofore set out are:

First—Was the foreman alone on the bridge at the time of the happening of the accident, and if so at what point on the bridge was he?

Second—Was the hammer on the bridge at that time? I so, at what point was it?

Third—If the hammer was on the bridge at that time, was it so placed that the foreman saw, or by the exercise of ordinary care might have seen it?

If it is demonstrated that the foreman was alone on the bridge, within a few feet of the hammer, and that the surface of the bridge had no obstruction on it, we are bound to say that to every reasonable mind it will be perfectly clear that the evidence amply sustains the verdict.

True, no one testifies that the hammer, at the very time of the accident, was on the bridge near the foreman. The reason for

this is plain. If the foreman should say he saw it, the inquiry would naturally arise, why did he not pick it up. If he said Carver left it there when he went off the bridge he would naturally feel that he was partly to blame, and hesitate to too sharply test his memory.

The foreman says that he was on the bridge at the time of the accident. He says [Rec., p. 24] that he was about the middle of the first span when he saw the train coming; * * * when he saw the train coming he looked up and down the track to see if everything was clear; did not see anything. and stepped to one side when the train was three or four hundred yards from him; *that he would have had plenty of time,* if there had been anything on the bridge. to get it off; * * * *that the track was not obstructed.*

I. E. Line, assistant foreman, test fied [Rec., p. 19]: "He was about one hundred yards east of the bridge when the train came, going after some timbers, with others. * * * There had been a spike maul used there that morning; * * * that he had used it himself just before he went out for the timber. * * * He was using it on the south side of the bridge for putting up the staging or scaffold. When he finished, he handed it to some one on the top of the bridge, who handed it to Mr. Carver." Witness states that he does not recollect any other spike maul or hammer there that morning than the one he had used, which was the regular spike maul described by former witnesses. Here witness testified to finding of maul after train passed as did other witnesses. * * * [Rec., p. 19]. There were several men working up at the east end of the bridge, Carver among them.

Ed. Carroll, plaintiff's witness, testified [Rec., p. 11]: "Just before the accident occurred he was east of the bridge, going after a piece of scantlin. * * * Soon after train passed he looked around and saw Carlin lying on the ground near the bank about sixty feet from witness. They went and picked up Carlin, and some one picked up a spike maul lying on the other side of Carlin,

with the handle broken off. That he had seen the spike maul before; that it had been used ever since he had been at work with the bridge gang, and it had been used on the track that morning; that he had seen some of the men driving spikes and nails with it *ten or fifteen minutes* before Carlin was hurt. * * * There were no flags out that morning." This witness says he saw some men on the track when the train passed. [Rec., p. 11.] Evidently he was not paying much attention, as he was going from the bridge for a scantlin. Witness further testified he saw Ed. Carver using it (the maul testified about) ten or fifteen minutes before the train came. They had been at work on the bridge an hour or an hour and a half.

Chas. Nichols, plaintiff's witness, testified as follows [Rec., p. 14]: He was standing about one hundred and fifty feet east of bridge when he first saw it (the train); that he had gone to get a piece of timber; that before the accident he had seen Ed. Carver out on the bridge using the spike maul; that he had left the bridge and gone out on the track *only a minute or two before the accident* and Ed. Carver and the foreman were the only men on the bridge. Walsh was on the bridge somewhere near the east end. He further testified [Rec., p. 16]: "The surface of the bridge was plain, that is, the ties were about eight inches apart, and there was nothing on top of them except the rails and the guard rails; the rails were of ordinary size; the guard rails were about ten inches from the rails and parallel with them. The guard rails were eight inches above the ties; they were let down over the ties about two inches; they were wood; the length of the span was about sixty feet; a bent is fifteen feet; the east approach consists of two bents."

Ed. Carver, witness for plaintiff, testified as follows [Rec., p. 18] "That he had been assisting to put some braces on the side of the bridge. * * * When the train passed he was beside the bridge, near the east end, and had been there but a few minutes;

that at the time the foreman was standing on the side of the bridge. Just prior to that time he had been working on the north side of the track, near the east end of the bridge, about ten feet from the end of the approach; that he and the foreman were the only persons on the bridge: that after he nailed the last piece of timber * * * he got down on the ground and was about ten feet from Carlin, and had been there not over three or four minu es when the train passed. * * * He states that he saw the maul lying near Mr. Carlin after the accident, and that he had seen it before, that morning, lying on the bridge; * * * that he got to plaintiff first after he was hurt; that he does not remember of seeing any one on the bridge by the foreman at the time. * * * [Rec., p. 18.] That it was a spike maul that was being used, and it must have been the one that was found near Carlin."

Mr. Carlin, plaintiff, testified [Record, p. 16]: "He was about twenty-six feet from the bridge at the time (of the accident), walking away from the track."

The evidence tending to establish the case of plaintiff for the purpose of testing these assignments must be taken as true.

From this evidence as find that Line, Nichols, Carroll and Carver were working near the east end of the bridge, a short time before the accident. They had all seen the maul there, and identified it as the one that hit Carlin. Welsh, the foreman, was also there. The span was sixty feet, the approach thirty. When the witnesses speak of the bridge, they being bridge men, it is apparent that they mean the span. The expression, near the east end, would resonably be fifteen feet west of the east end of the span; Carver makes it ten. These five men and the maul were there; then first Line and Nichols go off for a piece of timber, leaving Carver with the maul, and Carroll and Walsh with him on the bridge; (they had not been gone over a minute or two, according to Nichols, when the train came along) Carroll then leaves for a piece of scantlin,

Carver nails on his last piece of timber, walks down, and is by Carlin when he is hurt, leaving Walsh alone on the bridge. The hammer was last seen only a minute or two before, right at Walsh. It was certainly on the bridge. Carver must have been within five feet of Walsh, a legitimate conclusion, from the evidence, when he finished and laid down the maul. The evidence shows that the maul was a large object with a three-foot handle, on a plain surface with no obstruction.

Could it be inferred, or legitimately deduced from this, that Walsh saw, or ought to have seen it. The conclusion is irresistible. The circumstantial evidence is strong enough to convict a man of murder.

It is so wonderful that Walsh did not see it, that the theory naturally suggests itself to our minds that the real truth is that the train was so close on Walsh before he heard it that he became frightened and at once got off on the side of the bridge. This deduction is abundantly warranted from the testimony of Nichols [Rec., p. 14], Carlin [Rec., p. 16], Carroll [Rec., p 11], Carver [Rec., p. 19]; all in substance, to the effect that the train was very near the west end of the bridge when discovered, and that it was coming from thirty to forty miles an hour.

After the discussion of this proposition, will it not occur to the Court that the assignments of error do not point out the error complained of, to-wit: that there was no evidence that the hammer was on the bridge in a position in which it was, or could have been seen by the foreman. The statement of this suggestion only reinforces our independent propositions.

SECOND COUNTER-PROPOSITION

UNDER FIFTH, NINTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH SPECIFICATIONS OF ERROR.

When a given state of facts is such that reason-

able men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. The question of negligence is one of law only, when the facts and circumstances are such that all reasonable men must draw the same conclusion from them.

AUTHORITIES.

Gardner vs. Mich. Cent. R. R. Co., 150 U. S., 340.
Grand Trunk R. R. Co. vs. Ives, 144 U. S., 408.

In answer to the tenth specification of error we make the following counter-proposition, to-wit:

FIRST COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The statutes of the State of Texas, defining vice-principal and fellow servant, and copied in this brief under second assignment of error, makes the question of fellow-servant depend entirely, amongst other things, upon the grade of employment, and not the act done or omitted to be done. This had been the rule governing the relation of master and servant, ultimately adopted by the Supreme Court of this State prior to the passage of the act.

AUTHORITIES.

Nix vs. Texas & P. Ry, Co., 82 Tex., 473.
Sweeny vs. Ry. Co., 84 Tex., 433.

SECOND COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The master owes to the servant a reasonably safe place in which to perform his work, and to use ordinary care to keep same in a reasonably safe condition, and if, instead of personally performing these obligations, he engages another to do so, he is liable for the neglect of that other.

AUTHORITIES.

N. P. Ry. Co. vs. Peterson, 162 U. S., 346, 353
Hess vs. Rosenthal, 160 Ill., 621.
Harrison vs. Detroit Ry. Co., 79 Mich., 409.

ARGUMENT.

The question of who are fellow-servants went through various changes in the decisions of this State, some decisions adopting the rule of determining the relation from the character of the act done, or omitted to be done, the other from the grade of those employed. The legislature, to settle this question, adopted the latter rule. Under the evidence, Walsh was a vice-principal, and he was, and is, doubly made so under the statute; he had absolute supervision and control of the men. He directed Carlin to file saws; he was his superior. He was engaged in no work, but was on the bridge supervising and directing the men in their work. The law made it his duty, as the representative of his master, to furnish a safe place in which the work could be done, and to take such precautions as were necessary to keep it reasonably safe. This duty was one that devolved upon the master, and by making it the duty of fellow servants, while on the bridge, if a train approached, cannot change his liability if he neglected this duty, and the place, by reason of

his neglect, became unsafe. It was Walsh's duty to keep all obstructions from the bridge, and to keep same clear of obstructions. There were no servants on the bridge when the train came. The foreman alone was there; was it not his duty to have and to keep the bridge at all times clear of all obstructions likely to cause injury, and was not this duty heightened by reason of the fact that he had no slow orders or flags out, and at any time he might expect a train, at what rate of speed he did not know? Can the master, by being upon this obstructed bridge alone, after sending his men to various duties away from the bridge, so that he could not, in an emergency, summon them to remove the obstructions, avoid liability by saying that it was equally the duty of a fellow servant to remove obstructions from the track? No, no more could he delegate this positive duty he owed the men under his control. Had a fellow-servant been on the bridge with the foreman, then possibly the duty devolved upon the foreman to make him remove any obstructions, but such was not the case, and hence there can be no error in refusing the charge complained of. It was his duty to see it was clear; that was what he was there for. Can he by neglect of this duty escape liability, because, being alone, he failed to perform it, while acting in the capacity of vice-principal, as defined by the statutes?

THIRD COUNTER-PROPOSITION

UNDER THE TENTH SPECIFICATION OF ERROR.

The Supreme Court of the State of Texas, having construed this statute, the Supreme Court of the United States will follow this construction.

AUTHORITIES.

U. S. Rev. Stat., Sec. 721.

Baugh vs. B. & O. Ry. Co., 149 U. S., p. 368.

Long vs. Chicago, R. & T. Ry. Co., 94 Tex., 53.

French vs. Ill. Cent. Ry. Co., 100 Fed. Rep., 247.
Pearce vs. Van Duzen, 78 Fed Rep., 693.

FOURTH COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The negligence in this case was within the non-assignable duties of the railway company, in that it was the duty of the company to provide a reasonably safe place in which its men could work, and to use ordinary care to keep it safe, or to make it safe if its unsafe condition was apparent to the company, or its vice-principal, or if its unsafe condition ought to have been, or could, by the exercise of reasonable prudence or diligence, have been known to the company or its vice-principal in charge of the work, and this duty is one which cannot be, by the principal, so neglected that it can escape liability for its non-performance, nor can he, in the exercise of his authority, so distribute his men as that in an emergency he should, in the performance of his duties, be compelled to perform a menial act, and thereby, by his failure to do so, exempt his employer from liability.

FIFTH COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The charge of the Court, confining the recovery of plaintiff to the fact that the foreman was alone on the bridge, amongst other facts, the requested charge

could have no possible application to the state of facts upon which plaintiff recovered. Therefore, the Court did not err in refusing the requested charge.

STATEMENT.

Charge of the Court: "* * * and you further believe, from the evidence, that at the time the train approached the foreman of the bridge gang was the only person upon upon the bridge. [Rec., p. 22.]

The inapplicability of the requested charge upon the above statement was apparent.

In answer to the seventh specification of error we make the following counter-propositions, to-wit:

FIRST COUNTER-PROPOSITION

UNDER SEVENTH SPECIFICATION OF ERROR.

The Court properly and fully instructed the jury concerning the matters complained of in special charge No. 3, the refusal of which is assigned as error.

STATEMENT.

Charge of the Court [Rec., p. 22]: "* * * and if you further find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you will find for plaintiff."

Charge of the Court, Sec. [Rec., p. 23]:

Sixth—"If you should find that the defendant, through the foreman of the bridge gang, was guilty of negligence, you must also find that the negligence of the foreman was the proximate cause of the accident and injury to plaintiff. And you are charged that an

act of negligence is the proximate cause of an injury, if the act of negligence contributed to cause the injury, and was such an act that an ordinary careful and prudent man could and would have anticipated the causing of the injury under the facts and circumstances existing at the time, and which were known, or could have been known, to him by the exercise of ordinary care, had he been in the foreman's place and stead; and it is not necessary, in order to constitute an act of negligence, the proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the accident or injury should happen or occur in the particular manner in which it did occur."

SECOND COUNTER-PROPOSITION

UNDER SEVENTH SPECIFICATION OF ERROR.

The requested charge is not, under the facts in this case, a correct proposition of law, in that it required the result that followed from the foreman's failure to discover the maul to be such a result as ought to have been foreseen in light of the attending circumstances. For that it necessitated the foreseeing that the exact result would follow, and ought to have been foreseen. Whereas, the true rule is, that if an ordinarily prudent person ought to have foreseen that injury might likely result to any person by reason of the negligence of the foreman in discovering the maul on the track, under the circumstances, the anticipation of any injury would be sufficient to con titute the leaving of the maul there, while a train was approaching, the probable consequence of the injury done and the proximate cause thereof.

AUTHORITIES

Texas & Pocific Ry. Co. vs. Short, 58 S. W. R., 57, 58.
Doyle vs. Chicago, St. Paul & Kansas Ry Co., 39 Am. & Eng. Ry. Cases, 314.
Baltimore & Ohio Ry. Co. vs. Anderson, 85 Fed. Rep., 413.
Herrich vs. Jagby, 101 Fed. Rep., 187.
Lopfi vs. Postal Telegraph Cable Co., 60 Fed. Rep., 987.
Chicago & N. W. Ry. Co. vs. Prescott, 59 Fed. Rep., 237.
Jackson vs. G. H. & S. A. Ry. Co., 90 Tex., 372.
G. C. & S. F. Ry. Co. vs. Wood, 63 S. W. R., 164.
G. C. & S. F. Ry. Co. vs. Marchand, 57 S. W. R., 860.

In answer to the ninth specification of error we make the following counter-proposition, to-wit:

COUNTER-PROPOSITION

UNDER NINTH SPECIFICATION OF ERROR.

The Court correctly and fully charged the law in reference to the point made in the special charge No. 5, the refusal of which is assigned as error.

STATEMENT.

Charge of Court, Sec. 6. [Rec., p. 23] already set out under counter-proposition to seventh specification of error.

Charge of Court, Sec. [Rec p 22]:

Fourth—"If you believe from the evidence that the spike maul testified about was left on the bridge by a fellow servant of plaintiff, and you further believe from the evidence that at the time the train approached, the foreman of said bridge gang was the only person upon said bridge, and that he could, by the exercise of ordinary care, as I have defined same herein, have seen said spike maul and removed same from the track and from proximity thereto, if you believe it

was on the track or in proximity thereto, and if you further believe that it was the duty of such foreman to use such care to see that the track was clear and no obstruction on the track, or so near it as to be struck by a passing train, and if you further believe said foreman did not use such care, and that said spike maul or hammer was struck by said train and hurled against said plaintiff and caused him said injuries, and if you further believe that it was negligence of the foreman in failing to see and remove said spike maul, if you find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you should find for the plaintiff."

Section 5, charge of Court [Rec., p. 23]: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it will be your duty to find for the defendant."

In answer to the third specification of error, we make the following counter-proposition, to-wit:

COUNTER-PROPOSITION

UNDER THIRD SPECIFICATION OF ERROR.

The charge of the Court complained of was justified by both the law and the evidence.

STATEMENT.

George Walsh, foreman, testified [Rec., p. 21]: "That as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him, as well as all the other bridge men who were working there on that morning.

AUTHORITIES.

Articles 456of, 456og and 456oh, Sayles Civil Statutes of Texas, 1897.

These statutes are set out in full in the marginal note to the opinion of the Court below, and are as follows:

STATEMENT.

Sayles' Revised Statutes of Texas, 1897.

Article 456of. Liable for injuries co-servants end employes. Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employe of such person, receiver or corporation, and the fact that such servants or employes were fellow-servants with each other shall not impair or destroy such liability. [Acts 1897, S. S., p. 14, Sec. 1.]

Art. 456og. Who are vice-principals.

All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, who are instructed by such person, receiver or corporation, with the authority of superintendence, control or command of other servants or employes of such person, receiver, or corporation, or with the authority to direct any other employe in the performance of any duty of such employe, are vice-principals of such person, receiver, or corporation, and are not fellow-servants with their co-employes. [Ib., Sec. 2.]

Art. 456oh. Who are fellow-servants.

All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or

street railway, and who, while so employed, are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place, and at the same piece of work, and to a common purpose are fellow-servaets with each other. Employes who do not come within the provisions of this article shall not be considered fellow-servants. [Ib., Sec. 3.]

To this point we have followed the opinion of the Court in the order in which the points made by the plaintiff in error were considered by the Court below, and have done so hoping that it would be for the convenience of this Court. Having considered the foregoing specifications of error, which include all the assignments of error noticed by the Court below, it still remains for us to consider those assignments of error briefed in the Court below and not noticed by it, to-wit: the first and fifth assignments of error in the Court below, being the second and sixth specifications of error in this Court, and while we regard them as so immaterial as not to require notice, yet nevertheless we feel that the counter-propositions made by us may not be out of place, and we make, under the second specification of error, the following counter-proposition:

COUNTER-PROPOSITION

UNDER SECOND SPECIFICATION OF ERROR.

The assignment of error in the Court below does not correctly quote the charge of the Court, which is as follows: "Ordinary care is defined as such care as a person of ordinary prudence might be expected to exercise under similar circumstances" More than this the law does not require, but less than this is negligence, or in other word, negligence

consists in omitting to do something which an ordinarily prudent man would not omit, or in doing something which an ordinarily prudent person would not do under similar circumstances. In the preceding sentence the Court instructed the jury that only ordinary care was required of the defendant, and throughout the charge used the expression in reference to the degree of care to be exercised by the defendant, "that of a man of ordinary care and prudence." The charge as a whole, as given, is correct, and no prejudice could have resulted to the defendant therefrom nor could the jury have been misled thereby.

And under the sixth specification of error we make the following counter-proposition:

COUNTER-PROPOSITION

UNDER SIXTH SPECIFICATION OF ERROR.

The Court did not err in that it refused the second special charge requested by the appellant, in that it requested the Court to eliminate from the consideration of the jury the rate of speed of the train, and the fact that the bridge foreman did not have out flags, for that they were attendant circumstances to be considered by the jury in determining the question of diligence to be observed by the foreman to guard against accident.

STATEMENT AND ARGUMENT.

It is a rule that his care at all times was such care as a person of ordinary prudence would exercise under similar circumstances,

but the degree of diligence to be exercised would be increased or diminished according to the surrounding circumstances known, or that it was his duty to anticipate.

AUTHORITIES.

Ry. Co. vs. Smith, 87 Tex., 354.
Ry. Co. vs. Brenig, 25 Md., 388.

In presenting the case for the defendant in error, we have not thought it proper, in view of the very lucid opinion of the Court below, to make any extended argument on any proposition, feeling that it would burden the Court, and could not assist it in any way.

We do not feel, however, that we can do justice to our client unless we suggest to this Court that this writ of error was taken for delay merely, and not that justice may be done. It will be perfectly apparent to this Court that there is not a specification of error made which has in it, viewed in the light of the opinion of the Court below, and of the general law upon the subject, the slightest merit. The history of litigation in appellate courts is a matter well known to this Court, that if, by presenting unto this Court specifications of error so obviously untenable as those herein presented, the plaintiff in error can obtain long delays in being compelled to pay the judgment against it, it must at once appear to this Court that great injustice is likely to be done to litigants who are unable to bear the cost of expensive litigation and to await the long delays which necessarily flow from a writ of error to this Court.

As will appear from the opinion of the Court below, as is usual in such cases, appeal to the Court is sought to be made for leniency on the ground that the juries are prejudiced against corporations, a contention which the Court below dealt with in a most just and satisfactory way. But whatever may be the case in this regard, this is a case in which it certainly cannot be said that any prejudice of

any sort had any weight, for peculiar as it may seem there is not, in this record, a disputed fact, unless it be the fact that the foreman saw the obstruction and did not remove it was disputed by circumstances of such nature as to warrant the jury in believing that he did see it, or could have seen it by the exercise of the care required under the circumstances.

The verdict of the jury was obviously rendered upon the theory that if the foreman did not see it he, by the exercise of such care as a reasonably prudent person would have exercised under similar circumstances, could have seen it, and we venture to assert that from the facts in evidence, all of which are absolutely undisputed, there could have been no finding by any jury of reasonable men upon the question of negligence which would have been other and different from that found in this case, and they were amply supported by the evidence in drawing the conclusion they did.

It is useless for us to call the Court's attention to authorities upon the question of damages for delay, because they must be fully in the mind of the Court, and we respectfully ask this Court to grant us damages for delay herein, if the Court should take our view and hold that the specifications of error were obviously untenable.

Respectfully submitted,

Hallsyi

Attorney for Defendant in Error.

Harris

J C Jones Jr

Of Counsel.